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No. 04-165

Supreme Court, U.S.
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IN THE

Supreme Court of the United States

COMSTOCK RESOURCES, INC., *et al.*,

Petitioners,

v.

DON C. KENNARD AND HARROLD E. WRIGHT,

Respondents.

On Petition for a Writ of Certiorari to the United States Court of Appeals for the Tenth Circuit

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SUPPLEMENTAL BRIEF FOR PETITIONER

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SUPPLEMENTAL BRIEF FOR PETITIONER

Pursuant to Rule 15.8, Petitioner Comstock Resources, Inc. respectfully files this supplemental brief to advise the Court of the Fifth Circuit's opinion in *United States ex rel. Reagan v. East Texas Medical Center Regional Healthcare System*, No. 03-20376, __ F.3d __, 2004 WL 1959083 (5th Cir. Sept. 21, 2004) ("*Reagan*"), which was released after Comstock's reply brief had gone to the printer. That case deepens the conflict identified in the petition and demonstrates why resolution of the conflict is critical.

In *Reagan*, although the putative relator had gained some small amount of the information underlying the allegations of fraud from her own personal observation, the bulk of her knowledge was obtained by "'piecing together fragments of documentation' through FOIA requests, interviews, and review of documents in the state archives" and applying "her experience as a hospital administrator." *Reagan*, 2004 WL 1959083, at *6. Notwithstanding her intensive investigation, the Fifth Circuit concluded that she lacked the requisite "direct and independent knowledge" to qualify as an original source.

In particular, in direct conflict with the Tenth Circuit, the Fifth Circuit held that relator's knowledge was not "direct" because "the knowledge that she brings to the case is almost entirely indirect – that is, based on research and review of public records, not, with minor exceptions, her own observation." *Reagan*, 2004 WL 1959083, at *7; *cf.* Pet. at 23 (noting that circuits other than the Tenth Circuit require direct knowledge to come from "direct observation of or participation in the alleged fraud"). The Fifth Circuit thus correctly realized (as the Tenth Circuit did not) that knowledge based on research and review of public records rather than personal observation of the allegedly fraudulent

conduct is not "direct . . . knowledge" under 31 U.S.C. § 3730(e)(4).

To be sure, the Fifth Circuit addressed the role that a detailed investigation might play. But it did so only in the context of relator's argument that the investigation was relevant to supplement "the limited information to which she was privy," *Reagan*, 2004 WL 1959083, at *7, that is, to supplement the personal observation that triggered the subsequent investigation and that is the *sine qua non* of direct knowledge. For the Fifth Circuit, as in many other circuits outside the Tenth Circuit, detailed investigation can supplement, but cannot substitute for, personal firsthand knowledge.[1] Because the relator lacked any meaningful firsthand knowledge of the fraud alleged in her complaint, she could not meet the "direct . . . knowledge" requirement for "original source" status based on her investigation and effort. Application of the Fifth Circuit's analysis to the

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[1] That is the import of the Fifth Circuit's citation to *United States ex rel. Springfield Terminal Railway Co. v. Quinn*, 14 F.3d 645 (D.C. Cir. 1994). There, the relator first had "personal knowledge of the arbitration proceedings," 14 F.3d at 657, that he subsequently supplemented with extensive investigation. The D.C. Circuit held that the combination of prior personal knowledge and subsequent investigation was sufficient to constitute "direct" knowledge. *Id.*; *see also* Pet. 18-19; Reply 4 & n.3 As Comstock suggested in its petition, *see* Pet. 21 n.5, the Eleventh Circuit's decision in *Cooper v. Blue Cross & Blue Shield of Florida, Inc.*, 19 F.3d 562 (11th Cir. 1994), is to the same effect. There, the putative relator initially had firsthand knowledge gained by observing the fraudulent handling of his own benefit claims, and then supplemented that knowledge through an investigation. *See* 19 F.3d at 564, 567, 568 (evidence of wrongdoing obtained initially though processing of his own claims).

relators in the instant case would certainly have resulted in dismissal of their complaint against Comstock. The Tenth Circuit's decision is thus in conflict with the Fifth Circuit's decision in *Reagan*.

The Fifth Circuit's decision also underscores the pressing need for resolution of the conflict identified in Comstock's petition. The meaning of the "direct . . . knowledge" requirement is an issue of broad significance to all companies that do business with or pay funds to or receive funds from the federal government (and thus are potential targets for *qui tam* actions). *Reagan* confirms that, absent guidance from this Court, the issue will continue to divide and confuse the lower courts.

As this case indicates, that division has real-world consequences. This action was filed initially in the Eastern District of Texas and was transferred to the District of Wyoming for pretrial proceedings as a result of the MDL process. *See* Pet. 8-9, 27-28. Thus, absent similar *qui tam* actions against other defendants in other circuits – over which Comstock had no control – this case would have proceeded in the Fifth Circuit and (as *Reagan* demonstrates) relators' case would have been dismissed. Liability should not depend on such fortuity.

Respectfully submitted,

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